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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

11 Nutrishare, Inc., a California corporation,

12 Plaintiff,

13 v.

14 BioRx, LLC, an Ohio Limited Liability
15 Company,

16 Defendant.

Case No. 2:08-CV-01252-WBS-EFB

**OPPOSITION TO MOTION TO DISMISS
OR TRANSFER VENUE**

ORAL ARGUMENT REQUESTED

Date: August 11, 2008
Time: 2:00 p.m.
Dept: Courtroom 5
Judge: Hon. William B. Shubb

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I. INTRODUCTION

Defendant BioRx – after applying for and obtaining two licenses with the California Board of Pharmacy located in Sacramento permitting it to conduct business in California, including to ship its NutriThrive products to California residents in their homes, after designating an agent for service of process in Sacramento in its pharmacy license applications, and after admitting that it has customers for its NutriThrive products within California – now moves to dismiss or transfer this trademark infringement action on the grounds that it “has no contacts with this State” and “no contacts in this district.” (*See* Memo of Points & Authorities in support of Defendant’s Motion to Dismiss or Transfer, filed 7/23/08 (hereinafter “Motion”) at 1:7-8; 2:26.)

It is baffling how BioRx could possibly argue that it is not subject to personal jurisdiction or venue here in light of the overwhelming evidence to the contrary. BioRx’s internally inconsistent moving brief and its president’s declaration are replete with, on the one hand bald and patently false statements eschewing any contact with this state or district, and on the other hand admissions that BioRx does indeed do business in this State. Indeed, investigations have revealed that BioRx has such extensive contacts with California and this district that jurisdiction – and therefore venue – is more than proper in this Court.

Most compelling is the fact that, contrary to its statement that it “does not do business in California” (motion at 1), BioRx specifically applied for and obtained two licenses in Sacramento authorizing it to conduct business as a non-resident pharmacy and to conduct sterile compounding activities within California. (Declaration of Rodney Okamoto filed herewith (hereinafter “Okamoto Decl.”), Ex. C.) Furthermore, contrary to BioRx’s claim that it “has no agent for service of process in this state” (motion at 1), as a prerequisite to obtaining its pharmacy licenses, and under the California pharmacy law, BioRx necessarily submitted to the jurisdiction of California courts and the Board of Pharmacy in Sacramento and appointed Business Filings, Inc, located at 1232 Q Street, Sacramento, as its agent for service of process. (Declaration of Aparna Rajagopal-Durbin filed herewith (hereinafter “Durbin Decl.” ¶ 6, Ex. E.); *see also* Cal. Bus. & Prof. Code §§ 4086, 4300 *et seq.*, 4112. These licenses have authorized BioRx, from a licensure standpoint, to conduct its infringing activities in California as “NutriThrive,” including to ship

1 total parenteral nutrition and enteral nutrition products bearing the infringing “NutriThrive” mark
2 to its California customers. Cal Code Regs. §§ 1751 *et seq.*

3 BioRx’s claim that it “has never sought to obtain clients or business directly from the state
4 of California,” (motion at 2:5-6.) are likewise specious. Nutrishare knows of at least four BioRx
5 customers in this state, including within this very district, who have received NutriThrive
6 products and services. (Okamoto Decl., ¶ 6, Ex. D, ¶ 11; Declaration of Craig Rielly in support
7 of BioRx’s Motion to Dismiss and/or Transfer Venue filed 6/16/08, (“hereinafter Rielly Decl.”)
8 ¶¶ 12, 13.) And NutriThrive may be procuring more California customers this very moment.
9 Less than three months ago, NutriThrive fielded multiple calls from Nutrishare investigators who
10 inquired regarding whether it would provide its products and services within California.
11 (Okamoto Decl., ¶ 13; Declaration of Kathryn Bundy filed herewith (hereinafter “Bundy Decl.”),
12 ¶ 3.) In each instance, NutriThrive’s response was a resounding “yes.” (*Id.*) In one instance,
13 NutriThrive actually sent its “Patient Orientation” packet, including a thick binder and
14 promotional materials, to the California caller. (Bundy Decl., ¶ 3.) Less than a month ago,
15 NutriThrive was pounding the pavement in San Diego marketing to, soliciting, and aggressively
16 pursuing California customers. (Okamoto Decl., ¶¶ 7-10, 11; Messina Decl., ¶ 4; Bundy Decl.,
17 ¶¶ 4-5.) BioRx’s own president has admitted that NutriThrive has at least two California
18 customers who were procured “as a result of the customers contacting BioRx through its internet
19 website.” (Rielly Decl., ¶¶ 12, 13.) By this statement, Mr. Reilly also has admitted that BioRx
20 has an interactive web-site for its NutriThrive product line which is accessible by any person in
21 this judicial district. This web-site on multiple pages extols BioRx’s “reach” within all 50 states
22 and boasts that BioRx is licensed in most states. (Okamoto Decl., Ex A.)

23 This is only the tip of the iceberg, gleaned by nothing more than a few phone calls,
24 attendance at a conference, perusal of BioRx’s web-sites, and keyword searches on
25 www.google.com. Nutrishare has not yet been permitted to conduct any formal discovery.
26 Nevertheless, even the limited information that Nutrishare has thus far uncovered demonstrates
27 without a doubt that both jurisdiction and venue are proper in this Court. BioRx’s motion should
28 therefore be summarily denied. In the event that the Court does not find the evidence gathered

thus far to be sufficient, Nutrishare requests that the Court at least permit additional limited jurisdictional discovery prior to ruling on BioRx's motion.

II. BIORX'S CONTACTS WITH CALIFORNIA

Through Nutrishare's initial investigations, and without having had the benefit of discovery, Nutrishare has learned that BioRx has at least the following contacts with the State of California and this judicial district.

A. BioRx is "licensed to provide products and services in most states."

Contrary to BioRx's statements that it "has never sought to obtain clients or business directly from the State of California," (motion at 4:12), the "About Us" page on BioRx's interactive web-site, www.biorx.net, beckons to California customers immediately below and in the same space the "NutriThrive" logo and description, as follows:

NUTRITHRIVE

Improving life on nutrition support.

BioRx is licensed to provide products and services in most states.

Call us at **866-44-BIORX** to inquire as to service availability in your area.

(Okamoto Decl., Ex. B.)

B. BioRx's "clinical staff reaches patients and physicians in all 50 states."

The "BioRx News" page likewise reaches out to California customers. In a press release about its immunoglobulin services for patients suffering from immune deficiency disorders, BioRx states, "As one of the nation's fastest growing providers of IgG and other specialty pharmaceuticals, the company's clinical staff reaches patients and physicians in all 50 states. To learn more about BioRx and its products and services visit www.biorx.net." (Okamoto Decl., Ex. A.) (emphasis added).

C. BioRx has Obtained Two Licenses to Conduct Business in California as a "Non-Resident" Pharmacy.

Pursuant to the requirements of the California Pharmacy Law codified in the Business and Professions Code, BioRx has specifically applied for and obtained, with the California Board of Pharmacy, located at 1625 N Market Blvd, N219, Sacramento, California, 95834, two licenses

authorizing it to distribute pharmaceuticals within California and conduct sterile compounding activities within California as a non-resident pharmacy. (Okamoto Decl., Ex. C.) These licenses issued in September 2007 and July 2008, respectively. (*Id.*) As will be explained in more detail below, although NutriThrive has not separately obtained licenses, NutriThrive, as a d/b/a of BioRx, requires and necessarily must rely on BioRx's licenses in order to provide any of its products or services to California residents.

D. BioRx has an Agent for Service of Process in Sacramento.

Contrary to BioRx's claim that "it has no agent for service of process in the state" (motion at 1:6), BioRx has appointed Business Filings, Inc., located at 1232 Q. Street, 1st Floor, Sacramento, California, as its agent for service of process in California pursuant to the requirements of California pharmacy law. (Durbin Decl., Ex. E; *see also* Cal. Bus. & Prof. Code §§ 4086, 4300 *et seq.*, 4112.)

E. BioRx has Current and Former "NutriThrive" Customers in California, Including within the Eastern District.

Discussions on on-line consumer forum www.parent-2-parent.com indicate that NutriThrive has customers in Redding, California, within the Eastern District. (Okamoto Decl., ¶ 6, Ex. D.) These postings indicate that Jessi, mother of two boys, Jaxson and Joshua, is an active participant on the forum has been posting messages on the forum since at least February, 2008, has posted at least 500 messages to the forum since mid-April, and posts numerous messages nearly every day. (Durbin Decl., ¶ 5.) In mid-April, Jessi posted a message indicating she had switched her son's home infusion provider to NutriThrive. (Okamoto Decl., ¶ 6, Ex. D.) Unfortunately, Nutrishare has been unable to determine Jessi's full name or address. (Durbin Decl., ¶ 5.) However, if the Court requires additional evidence regarding the Redding family, Nutrishare requests that the Court permit Nutrishare to conduct limited jurisdictional discovery in order to confirm that Jessi and her family are indeed NutriThrive customers.

At the Oley Conference held in San Diego on June 26 through June 29, 2008, Nutrishare learned that NutriThrive has had at least one additional TPN customer in California. (Okamoto Decl., ¶ 11.) This customer, Rosemarie Mielke of Lancaster, California, subsequently changed

1 her home infusion provider to Crescent Healthcare. (*Id.*)

2 Nutrishare learned from BioRx's most recent court filing that NutriThrive has at least two
3 additional customers who live in California. In his July 16, 2008 Declaration, BioRx's president
4 Phillip Rielly stated.

5 NutriThrive does . . . have two customers located in California who receive
6 Enteral Nutrition products from BioRx. . . . BioRx delivers product to these
customers on a monthly basis by federal express delivery from Cincinnati, Ohio.

7 (Rielly Decl., ¶¶ 12, 13.)

8 **F. BioRx and NutriThrive have an Interactive Web-site for NutriThrive in this Judicial**
9 **District.**

10 BioRx and NutriThrive have an interactive web-site accessible to all Internet users in
11 California, including those in the Eastern District. (Okamoto Decl., Ex. A, B.) In the words of
12 BioRx's own president, NutriThrive obtained at least two California customers "as a result of
13 these customers contacting BioRx through its internet website." (Rielly Decl., ¶ 13.) Indeed,
14 anybody in California can, through www.nutrithrive.com, request NutriThrive products and
15 services, refer patients to NutriThrive, sign up to become a "NutriThrive consumer," and
16 participate in on-line discussions with NutriThrive's customers, clinicians and "consumer
17 advocates." (Okamoto Decl., Ex. B.)

18 **G. NutriThrive has Informed Callers it is Will Serve California Residents and has**
19 **Mailed its "Patient Orientation" Packet to California Residents.**

20 NutriThrive has represented to callers that it is permitted to conduct business in California
21 and will send its informational packets to TPN consumers in California. (Okamoto Decl., ¶ 13;
22 Bundy Decl., ¶ 3.). NutriThrive also actually sent a "Patient Orientation" packet containing its
23 promotional materials and business card to a TPN consumer who lives in California. (Bundy
24 Decl., Ex. A.)

25 **H. NutriThrive has Relationships with Nursing Agencies within California.**

26 NutriThrive also represented to one caller that, although it is based on Ohio, it has
27 established relationships with local nursing agencies in California. (Bundy Decl., ¶ 3.)
28

I. NutriThrive Attended a Key Marketing Event in California, where it Marketed to and Solicited California Residents.

As BioRx's president has admitted, NutriThrive attended the 2008 Oley Conference held at the Mission Valley Marriott Hotel in San Diego between June 26 and June 29, 2008, where NutriThrive actively marketed products and services bearing the mark in dispute. This is a key marketing event for national home infusion companies. (Rielly Decl., ¶ 14.) This was an especially important marketing event for NutriThrive, as evidenced by the following announcement emblazoned across the center of its home page at www.nutrithrive.com:

**Annual OLEY
Conference**



June 26–30



Marriott San Diego
Mission Valley, California



www.oley.org or
(800)776-6539

(See Okamoto Decl., Ex. B.)

In fact, on the day Nutrishare's Complaint, summons, and preliminary injunction papers were served, both Nutrishare and NutriThrive were attending the Oley Conference (Okamoto Decl., ¶ 7.) There were approximately 200 conference attendees, the majority of whom are home infusion consumers, and several of whom are California residents (*Id.*) There were twenty-two companies that exhibited their products and/or services at booths in the exhibit hall. (*Id.*, Ex. E.) Eleven of those companies were home infusion providers. (*Id.*) Nine of those companies were national (versus local/regional) home infusion providers. (*Id.*) Nutrishare and BioRx d/b/a NutriThrive were two of the nine national home infusion providers. (*Id.*) At the conference, NutriThrive's name was prominently displayed on a banner hanging at the entryway to the conference facilities, immediately below Nutrishare's name in the same font size, color, and typeface. (*Id.*, Ex. F.) This banner was displayed throughout the duration of the conference. (*Id.*, ¶ 8, Ex. F.) In the exhibition hall, which was the only place where home infusion companies were permitted to display and market their products, both Nutrishare and NutriThrive had prominent booths, each at one of the two back corners of the hall. (*Id.*, ¶ 9, Ex. G.) NutriThrive's booth was staffed by, among others, Donna Noble (the mother of Nutrishare's former customer). (*Id.*, ¶ 9.) At NutriThrive's booth, conference attendees and/or exhibitors were provided with NutriThrive's promotional materials. (*Id.*)

On the Friday and Saturday of the conference, there was a conference-wide luncheon. Friday's lunch was sponsored by NutriThrive. On the day of this luncheon, NutriThrive's name was prominently displayed throughout the day on placards placed on the lunch buffet tables. (*Id.*, ¶ 10; Bundy Decl., ¶ 4.)

During the conference, a California resident, Kerry Stone of La Jolla, California, became confused and erroneously believed that the Friday luncheon was sponsored by Nutrishare. (*See* Declaration of Kerry Stone, filed 7/15/08). Also during the conference, another California resident, Sheila Messina of San Jose, California, noticed NutriThrive's booth and was curious about the new company. (Messina Decl., ¶¶ 3-4.) Yet another California resident, Kathryn Bundy of Los Angeles, California, felt uncomfortable when NutriThrive aggressively solicited her outside the allotted marketing period in contravention of Oley Foundation rules. (Bundy Decl., ¶ 5.)

J. BioRx has Exhibited at Other Conferences in California.

Based only on a search on www.google.com, Nutrishare has been able to identify at least two other conferences in California where BioRx was in attendance and had an exhibition booth. BioRx was an exhibitor in the 2005 annual meeting of the American Association of Neuromuscular and ElectroDiagnostic Medicine, which was held in Monterey, California. (Durbin Decl., Ex. A.) Furthermore, on the same day as the Oley Conference this year, BioRx was in attendance and marketing its products and services at the San Francisco-based Neuropathy Action Foundation's "Neuropathy Action Awareness Day," held at the University of California San Francisco's Mission Bay Conference Center. (*Id.*, Ex. B.)

K. BioRx has Business Partners in California.

A www.google.com search also revealed that BioRx worked with Bayer Healthcare, based in Berkeley, California, to publish a children's book on hemophilia entitled "The Great Inhibitor," in July, 2006. (*Id.*, Ex. C.)

L. BioRx has Sales Representatives Focused on Western Business.

Nutrishare has also learned that, as of 2006, BioRx had a Director of Business Development for the West, Julie Winston. (*Id.*, Ex. D.) Obviously its efforts have succeeded, as

1 BioRx has developed business in California.

2 **M. BioRx May Have Customers, Partners, Suppliers, and Referring Medical**
 3 **Professionals for its Other Product Lines in California.**

4 In its brief, BioRx admits to having three product lines outside the enteral and parenteral
 5 nutrition products and services offered by its NutriThrive division. However, noticeably absent
 6 from the brief is any mention of whether BioRx has any customers, partners, suppliers, or
 7 referring physicians for these other product lines. Given that BioRx has obtained two licenses to
 8 conduct all of its home infusion activities within this State, it is highly likely that BioRx has
 9 contacts with respect to its non-TPN products lines within California, and perhaps within this
 10 district. Should the Court require additional evidence to resolve BioRx's motion, Nutrishare
 11 requests that it grant Nutrishare leave to serve limited jurisdictional discovery in order to
 12 ascertain these contacts, which would support a finding of general jurisdiction. The nature of this
 13 discovery is outlined in greater detail in section III(D) below.

14 **III. ARGUMENT**

15 **A. There is More Than Sufficient Contact Between BioRx and the State of California to**
 16 **Warrant Jurisdiction in This Court.**

17 To establish jurisdiction, BioRx need only make a *prima facie* showing of facts that, if
 18 true, would support jurisdiction over the defendant. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151,
 19 1154 (9th Cir. 2006); *Doe v. Unocal*, 248 F.3d 915, 922 (9th Cir. 2001); *Ballard v. Savage*, 65
 20 F.3d 1495, 1498 (9th Cir. 1995); *Fields v. Sedgwick Assoc. Risks, Ltd.*, 796 F.2d 299, 301 (9th
 21 Cir. 1986); *see also Agilent Techs., Inc. v. Elan Microelectronics Corp.*, 2005 U.S. Dist. LEXIS
 22 34305, *8-10 (N.D. Cal. 2005). Moreover, for the purpose of a motion to dismiss for lack of
 23 jurisdiction, the Court should resolve all disputed facts in favor of the plaintiff, here, Nutrishare.
 24 *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002); *Pebble Beach Co.*, 453 F.3d at
 25 1154 (citing *Doe*, 248 F.3d at 922); *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588
 26 (9th Cir. 1996).

27 The general rule is that personal jurisdiction over a defendant is proper if it is permitted by
 28 a long-arm statute and if the exercise of that jurisdiction does not violate federal due process.

1 *Pebble Beach Co.*, 453 F.3d at 1155 (citations omitted). Here, both the California and Federal
 2 long-arm statutes – Cal. Code of Civ. Proc. Section 410.10 and Federal Rule of Civil Procedure
 3 4(k)(2) – require compliance with due process requirements. *Id.* Consequently, whether or not
 4 this Court has personal jurisdiction over BioRx hinges on due process.

5 The Due Process Clause permits a court to exercise personal jurisdiction over an out-of-
 6 state defendant when the defendant has such “minimum contacts” with the forum state that
 7 maintenance of the suit would not offend “traditional notions of fair play and substantial justice.”
 8 *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Personal jurisdiction may be either
 9 general or specific. *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). As
 10 demonstrated below, BioRx’s laundry list of contacts with the State of California meets both the
 11 requirements for general and specific jurisdiction.

12 **1. This Court has General Jurisdiction over BioRx.**

13 BioRx will be subject to the general jurisdiction of this Court if the quality and nature of
 14 its contacts with California are so “substantial, continuous, and systematic” that due process is not
 15 offended. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984). To
 16 determine whether there is general jurisdiction, courts examine “whether defendant makes sales,
 17 solicits or engages in business in the state, serves the state’s markets, designates an agent for
 18 service of process, holds a license, or is incorporated there.” *Bancroft & Masters, Inc. v. Augusta*
 19 *Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (citing *Hirsch v. Blue Cross, Blue Shield*, 800
 20 F.2d 1474, 1478 (9th Cir. 1986)). Courts have also considered whether the defendant has
 21 physical facilities or bank accounts in the state, or has conducted meetings in the state. *Perkins v.*
 22 *Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

23 The evidence uncovered thus far establishes that BioRx’s contacts with California have
 24 been substantial, continuous, and systematic. BioRx applied for two licenses to conduct
 25 pharmacy-related activities in this state, which issued on September 11, 2007 and July 8, 2008.
 26 (Okamoto Decl., Ex. C; *see also Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1174 (9th
 27 Cir. 2006) (finding general jurisdiction over nonresident defendant based on license to do
 28 business in the forum.)) In obtaining these licenses, BioRx also submitted to the general

jurisdiction of California courts and the California Board of Pharmacy. *See* Cal. Bus. & Prof. Code §§ 4300 *et seq.*; 4086. Also in connection with obtaining its business licenses, BioRx designated an agent for service of process in Sacramento, California in its license applications. (Durbin Decl., Ex. E.) Thus, BioRx’s claims that it “has no agent for service of process in this state” (motion at 1:6-7) is patently false. Based solely on its appointment of this agent, BioRx is subject to jurisdiction in California. *Mahroom v. Best Western Int’l, Inc.*, 2007 U.S. Dist. LEXIS 56006, *7 (N.D. Cal. 2007) (finding general jurisdiction where defendant “regularly conducts business in California, and it even has a registered agent in California who is allowed to receive service of process”).

Although Nutrishare has not yet determined when BioRx began conducting business in California, Nutrishare has learned that BioRx has frequently attended meetings and conferences in California, dating as far back as 2005. (Durbin Decl., ¶ 2.) BioRx also has business partners in this state, including Bayer Healthcare (which relationship dates back to at least 2006) and local nursing agencies. (Durbin Decl., ¶ 3; Bundy Decl., ¶ 3.) BioRx also has at least four customers in California for its NutriThrive products and services. (Rielly Decl., ¶¶ 12, 13; Okamoto Decl., ¶ 11.) BioRx also may have customers for its other product lines, including its hemophilia and immunoglobulin services, in California. And as with its NutriThrive products and services, BioRx may have contracts or relationships with local nursing agencies, other medical professionals, and vendors with respect to these other product lines. BioRx may also have California-based employees and/or sales representatives for these other services. All of these contacts, if they exist, would support a finding of general jurisdiction. If the Court requires evidence of such contacts, Nutrishare requests leave to conduct limited jurisdictional discovery to ascertain the nature and extent of these contacts with California.

Based on the above evidence, this Court has general jurisdiction over BioRx.

2. At a Minimum, This Court has Specific Jurisdiction over BioRx.

BioRx will be subject to the specific jurisdiction of this Court if the facts of this lawsuit are related to or arise out of its “minimum contacts” with California. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *World-Wide*

1 *Volkswagen Corp. v. Woodson*, 444 U.S. 286 313 (1980).

2 The Ninth Circuit has held that specific jurisdiction exists if (1) the defendant has
3 performed some act or consummated some transaction within the forum or otherwise
4 purposefully availed itself of the privileges of conducting activities in the forum; (2) the
5 plaintiff's claims arise out of or results from defendants forum-related activities; and (3) the
6 exercise of jurisdiction is reasonable. *Bancroft & Masters, Inc. v. Augusta Nat. Inc.* 223 F.3d
7 1082, 55 U.S.P.Q.2d 1941 (9th Cir. 2000); *see also Burger King Corp. v. Rudzewicz*, 471 U.S.
8 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). The first part of this test has been further
9 subdivided into two distinct questions: whether BioRx either (1) "purposefully availed" itself of
10 the privilege of conducting activities in the forum, or (2) "purposefully directed" its activities
11 toward the forum. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

12 In the context of a trademark infringement action, the Ninth Circuit has held that specific
13 jurisdiction exists when the plaintiff alleges that defendant intentionally infringed plaintiff's
14 rights knowing that plaintiff was located in the forum state. *Columbia Pictures Television v.*
15 *Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 289 (9th Cir. 1997); *Panavision Intern.,*
16 *L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998); *Nissan Motor Co. v. Nissan Computer*
17 *Corp.*, 246 F.3d 675, 2000 U.S. App. LEXIS 33937, *2 (9th Cir. Dec. 26, 2000). The case for
18 specific jurisdiction becomes even compelling if the alleged infringer advertises or sells its
19 allegedly infringing products in the forum state. *See, e.g., MCA Records, Inc. v. Charly Records,*
20 *Ltd.*, 1997 U.S. App. LEXIS 3684, *8 (9th Cir. 1997); *George Kessel Int'l, Inc. v. Classic*
21 *Wholesales, Inc.*, 2007 U.S. Dist. LEXIS 83261, *16 (D. Ariz. 2007).

22 For the reasons set forth below, this Court has specific jurisdiction over BioRx.

23 **a. *BioRx has Purposefully Availed Itself of the Benefits and Privileges of***
24 ***California in Connection with its Infringing Products and Services.***

25 The requirement of purposeful availment ensures that the defendant should reasonably
26 anticipate being haled into the forum State court based on its contacts. *World-Wide Volkswagen*
27 *Corp.*, 444 U.S. at 297. The purposeful availment test is met where "the defendant has taken
28 deliberate action within the forum state or if he has created continuing obligations to forum

1 residents.” *Ballard*, 65 F.3d at 1498. Evidence of purposeful availing is typically action taking
 2 place in the forum that invokes the benefits and protections of the laws in the forum, such as
 3 executing or performing a contract. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797,
 4 802, 803 (9th Cir. 2004).

5 There could be no more direct way of purposefully availing oneself of the benefits and
 6 privileges of California than applying for and obtaining a license authorizing one to conduct
 7 certain businesses within this state. The Supreme Court best articulated this rationale in
 8 *International Shoe* when it stated:

9 [T]o the extent that a corporation exercises the privilege of conducting activities
 10 within a state, it enjoys the benefits and protection of the laws of that state. The
 11 exercise of that privilege may give rise to obligations, and, so far as those
 12 obligations arise out of or are connected with the activities within the state, a
 procedure which requires the corporation to respond to a suit brought to enforce
 them can, in most instances, hardly be said to be undue.

13 *Int’l Shoe Co.*, 326 U.S. at 319. Courts of this Circuit have followed suit. For example, in ruling
 14 on a motion to dismiss a complaint against a company that had acquired a license to conduct
 15 gaming activities within Nevada, a court of this Circuit held:

16 Defendants purposely availed themselves of the privilege of conducting activities
 17 in Nevada, and invoking the benefits and protections of Nevada’s laws, . . . by
 18 acquiring a Nevada gaming license. . . . Both [Defendants] were registered as doing
 19 business in Nevada to aid in the [project that is the subject of Plaintiff’s
 20 Complaint.] **Even if . . . Defendants . . . never conducted any business in
 Nevada besides obtaining a license, voluntary compliance with a state’s
 21 corporation law is a contact which facilitates significant privileges for
 conducting activities within that state.** Furthermore, the business licenses . . .
 arise out of activities surrounding [the project that is the subject of Plaintiff’s
 Complaint.]

22 *Morgan Stanley High Yield Secs., Inc. v. Jecklin*, 2006 U.S. Dist. LEXIS 53489, * 7-8 (D. Nev.
 23 2006) (emphasis added).

24 In this case, BioRx has not only obtained one, but two licenses specifically authorizing it
 25 to conduct the activities from which Nutrishare’s complaint arose: compounding total parenteral
 26 and enteral nutrition solutions and shipping them to California residents under the “NutriThrive”
 27 mark. *See* Cal. Bus. & Prof. Code §§ 4123 (requiring that licensed pharmacies report
 28

1 compounding drugs for parenteral therapy to the Board of Pharmacy), 4127 *et seq.* (specific
 2 license required for sterile compounding activities); Cal Code Regs. §§ 1751 *et seq.* (in-home
 3 parenteral therapy requires specific license and procedures). Thus, under *Morgan Stanley High*
 4 *Yield Secs., Inc.*, even if BioRx has not conducted any business in California other than obtaining
 5 these licenses, it would meet the purposeful availment requirement. That said, BioRx actually
 6 marketed and sold its NutriThrive products and services in California under these licenses.
 7 (Rielly Decl., ¶¶ 12-13; Okamoto Decl., ¶ 6, Ex. D; Bundy Decl., ¶¶ 3-5; Messina Decl., ¶¶ 3-4.)

8 In exchange for the benefits and privileges of these licenses, BioRx has agreed to be
 9 subject to the jurisdiction of the California Board of Pharmacy in relation to violations of the law
 10 requiring suspension or revocation of its pharmacy licenses. Cal. Bus. & Prof. Code §§ 4300 *et*
 11 *seq.* Furthermore, BioRx has agreed to be subject to the jurisdiction of the courts of this State,
 12 including the courts of this district, in matters related to its violations of pharmacy law. For
 13 example, if BioRx's Redding-based NutriThrive customers receive a NutriThrive TPN nutrient
 14 solution that they allege is adulterated, the California Board of Pharmacy can commence
 15 proceedings against BioRx in a Shasta County court – within this judicial district. Cal Bus. &
 16 Prof. Code § 4086 (proceedings may be brought “in the superior court in whose jurisdiction the
 17 dangerous drug or dangerous device is located”). Thus, when BioRx obtained its licenses and
 18 began shipping pharmaceutical products within this district, it consented to the jurisdiction of the
 19 courts within this district. This alone should lead to a finding of purposeful availment.

20 BioRx also was required to appoint an agent for service of process in this State who is
 21 authorized to receive complaints related to BioRx's, and specifically NutriThrive's, violations of
 22 the state pharmacy regulations. Cal. Bus. & Prof. Code § 4112. Pursuant to this requirement,
 23 BioRx appointed an agent for service of process in Sacramento, California. (Durbin Decl., Ex.
 24 E.) Under the law of this Circuit, BioRx's appointment of a California agent for service of
 25 process is sufficient for a finding of personal jurisdiction. *See Mahroom v. Best Western Int'l,*
 26 *Inc.*, 2007 U.S. Dist. LEXIS 56006 (N.D. Cal. 2007) (finding personal jurisdiction where
 27 defendant “regularly conducts business in California, and it even has a registered agent in
 28 California who is allowed to receive service of process.”)

1 Because BioRx has purposefully availed itself of the benefits and privileges of this State,
2 the Court should find that there is at least specific jurisdiction over BioRx in this forum.

3 **b. *BioRx has Purposefully Directed its Infringing Activities Towards***
4 ***California.***

5 Not only has BioRx purposefully availed itself of the privileges of conducting business in
6 California, but it has also purposefully directed its activities to California. The Supreme Court
7 has held that due process permits the exercise of personal jurisdiction over a defendant who
8 “purposefully directs” his activities at residents of a forum, even in the “absence of physical
9 contacts” with the forum. *Burger King*, 471 U.S. at 476 (citing *Keeton v. Hustler Magazine, Inc.*,
10 465 U.S. 770, 774-75 (1984) (finding purposeful direction where defendant published magazines
11 in Ohio and circulated them in the forum state)); *see also Mattel, Inc. v. MCA Records, Inc.*, 296
12 F.3d 894, 899 (9th Cir. 2002) (finding purposeful direction where defendant distributed its pop
13 music albums from Europe in the forum state); *World-Wide Volkswagen*, 444 U.S. at 297-98
14 (noting that a “forum State does not exceed its powers under the Due Process Clause if it asserts
15 personal jurisdiction over a corporation that delivers its products into the stream of commerce
16 with the expectation that they will be purchased by consumers in the forum State”); *Plant Food*
17 *Co-Op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155, 158-60 (9th Cir. 1980) (relying on this
18 language in *World-Wide Volkswagen* to hold that a Canadian fertilizer distributor that shipped
19 defective or mislabeled fertilizer to Montana may properly be subject to personal jurisdiction
20 there).

21 Evidence of purposeful direction generally consists of action taking place outside the
22 forum that is directed at the forum. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797,
23 802 (9th Cir. 2004). This Circuit evaluates purposeful direction under the “Calder Effects test,”
24 in which specific jurisdiction exists even if the defendant has not purposefully availed itself of the
25 benefits of this state as long as the defendant: (1) committed an intentional act, (2) expressly
26 aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the
27 forum state. *Id.* at 803 (citing *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482
28 (1984).)

(1) BioRx's Intentionally Infringed Nutrishare's mark knowing Nutrishare is Located in California.

Under the law of this Circuit, even if BioRx had not sent a single infringing product into California, BioRx nevertheless purposefully directed its activities towards this State merely by intentionally infringing Nutrishare's mark with full knowledge of Nutrishare, its location, and its mark. *See, e.g., Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 289 (9th Cir. 1997) ("[Plaintiff] alleged, and the district court found, that [defendant] willfully infringed copyrights owned by [plaintiff], which, as [defendant] knew, had its principal place of business in the Central District. This fact alone is sufficient to satisfy the 'purposeful availment' requirement."); *Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (holding that the effects test was satisfied in a trademark infringement case as defendant knew that plaintiff would suffer harm in California, since "its principal place of business was in California, and the heart of the theatrical motion picture and television industry is located there"); *Nissan Motor Co.*, 2000 U.S. App. LEXIS 33937 at *2-3 ("Here, Nissan North America, a California resident, alleges that NCC intentionally infringed upon its trademark and that such harm was suffered primarily in its home forum. NCC claims there was no evidence it knew that Nissan North America was a California resident. But NCC admits that it received a certified letter from Nissan North America, which contained its California address, several years before it began advertising auto products on its webpage. And NCC does not purport to have relied on a belief that Nissan North America was a resident of a different forum. Accordingly, the district court correctly concluded that NCC expressly aimed its allegedly infringing activities at California"); *IO Group, Inc. v. Pivotal*, No. C 03-5286 MHP, 2004 U.S. Dist. LEXIS 6673, *18 (N.D. Cal. Apr. 19, 2004) (concluding, in a copyright infringement case, that plaintiff "has adequately demonstrated that defendants published images belonging to a California company, affecting an industry primarily centered in California, knowing that harm would likely be felt in that state"); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F.Supp.2d 1073, 1090 (C.D. Cal. 2003) ("Plaintiffs have alleged that Sharman intentionally and materially contributed to the infringement of Plaintiffs' works, and that it did so with full knowledge that much of the harm from this

1 infringement would be suffered in California. This is sufficient to establish a prima facie case of
2 purposeful availment under the effects test of Panavision”).

3 (2) BioRx Shipped Infringing Products to California Residents.

4 BioRx also purposefully directed its activities to California by procuring California
5 customers for its NutriThrive products and services, establishing relationships with California
6 nursing agencies in connection with its NutriThrive products and services, shipping its
7 “NutriThrive” orientation packet to prospective and actual NutriThrive customers in California,
8 and shipping infringing NutriThrive products into California. (Rielly Decl., ¶¶ 12-13; Okamoto
9 Decl., ¶¶ 6-13; Bundy Decl., ¶ 3-5.) Even if BioRx sold only one NutriThrive product or service
10 within this State, there would be sufficient purposeful direction for a finding of specific
11 jurisdiction. *See, e.g., MCA Records, Inc. v. Charly Records, Ltd.*, 1997 U.S. App. LEXIS 3684,
12 *8 (9th Cir. 1997) (“By advertising and selling allegedly infringing products in California, a
13 party should reasonably expect to be haled into a California court to defend an infringement
14 action.”); *George Kessel Int’l, Inc. v. Classic Wholesales, Inc.*, 2007 U.S. Dist. LEXIS 83261,
15 *16 (D. Ariz. 2007) (finding specific jurisdiction because plaintiff marketed and sold its
16 infringing products in forum state) (citing *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223-24
17 (1957) (finding a single contract formed sufficient contacts for due process when contract had
18 substantial connection to the forum state)).

19 (3) BioRx Maintains an Interactive Web-site that Reaches Out to
20 California Residents.

21 BioRx’s “purposeful direction” also originates from BioRx’s maintenance of an active
22 web-site through which BioRx can, and in fact already has, procured NutriThrive customers.

23 This Circuit is all-too-familiar with the long line of cases discussing the level of
24 “interactivity” of a web-site. On the one hand, a passive web-site and a domain name, without
25 anything else done “to encourage residents of the forum state” is insufficient for a finding of
26 jurisdiction in this forum. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156 (9th Cir. 2006) (no
27 personal jurisdiction where web-site operator registered domain name and posted passive web-
28 site without anything more); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418-20 (9th Cir.

1 1997) (same); *see also Bensusan Restaurant Corp., v. King*, 937 F. Supp. 295, 297

2 (S.D.N.Y.1996) (no personal jurisdiction where defendant's web-site contained only general
3 information and user had to call the number on the web-site to get further information.)

4 On the other hand, interactive web-sites subject the web-site operator to specific
5 jurisdiction in any forum where the web-site users can "exchange information with the host
6 computer." *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997). Examples
7 include web-sites that encourage residents of the forum state to contact them, procure customers
8 through their web-site, develop mailing lists based on web-site solicitations, and directly target
9 customers of the forum. *See Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998);
10 *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264- 66 (6th Cir.1996) (finding personal
11 jurisdiction where web-site operator uploaded software on the web-site for residents in forum
12 state to use, knowingly entering into a contract with forum state residents, and "deliberately and
13 repeatedly" transmitted files to the forum state); *Zippo Mfr. Co. v. Zippo Dot Com, Inc.*, 952 F.
14 Supp. 1119, 1126 (W.D. Pa. 1997) (finding personal jurisdiction where defendant contracted with
15 forum state residents and Internet Access Providers and "exchanges information" with forums
16 state residents via its web-site.); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333-34
17 (E.D.Mo.1996) (finding personal jurisdiction where defendant encouraged users to add their
18 address to a mailing list that basically subscribed the user to defendant's service on the grounds
19 that defendant's conduct amounted to "active solicitations" and "promotional activities" designed
20 to "develop a mailing list of Internet users" and that the defendant "indiscriminately responded to
21 every user" who accessed the site.); *Inset Systems, Inc. v. Instruction Set*, 937 F. Supp. 161, 165
22 (D. Conn. 1996) (finding personal jurisdiction where web-site was always accessible to forum
23 state residents and defendant maintained a toll free number.); *Heroes, Inc. v. Heroes Found.*, 958
24 F. Supp. 1 (D.D.C. 1996) (finding personal jurisdiction where web page solicited contributions,
25 provided toll-free telephone number, and used the allegedly infringing trademark and logo);
26 *Blumenthal v. Drudge*, 992 F. Supp. 44, 56 (D.D.C. 1998) (finding jurisdiction over defendant
27 Matt Drudge because his web-site allows forum state residents to directly e-mail Drudge, thus
28 permitting an "exchange of information with the host computer.")

NutriThrive's web-site falls squarely within this Circuit's definition of an "interactive" web-site because it "permits users to exchange information with the host computer." Specifically, on the "Discussion Board" page, any user within California and the Eastern District can post messages or chat on-line with one of NutriThrive's "consumer advocates" – NutriThrive employees who are also consumers of its products and/or services. (Okamoto Decl., Ex. B.) This function is similar to the web-site in *Blumenthal v. Drudge*, 992 F. Supp. 44, 56 (D.D.C. 1988), which permitted users to contact the defendant on-line. Furthermore, on the "Referral" page, any user can sign up to become a "NutriThrive consumer" or refer a patient to become a "NutriThrive consumer." (Okamoto Decl., ¶ B.) Likewise, on BioRx's "Contact Us" page, any user within California and the Eastern District can request further information regarding BioRx's services. (Okamoto Decl., A.) These functions are like the web-site in *Maritz, Inc.*, where users were encouraged to provide defendant with their information on-line so that defendant could send them further information and subscribe the user to its services. *Maritz, Inc.*, 947 F. Supp. at 1332-33.

Even if the Court were to construe BioRx's NutriThrive web-site as passive, "operating even a passive website in conjunction with 'something more' – such as actively encouraging residents of the forum state – is sufficient to confer personal jurisdiction." *See, e.g. Rio Props. v. Rio Int'l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002) (finding personal jurisdiction because, in addition to running passive web-site, Defendant ran radio and print advertisements in forum state); *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998); *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000) (finding personal jurisdiction when "individualized targeting was present."); *Telco Communications v. An Apple A Day*, 977 F. Supp. 404, 407 (E.D. Va. 1997) (finding personal jurisdiction where defendant posted web-site advertisement, which could be accessed by forum state residents 24 hours a day, and ran two or three press releases in the forum); *Digital Equipment Corp. v. Altavista Technology, Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997) (maintenance of web site that can be accessed by Massachusetts citizens 24 hours a day coupled with other contacts is persistent course of conduct sufficient to confer personal jurisdiction). In this case, even if BioRx's and NutriThrive's web-site were considered "passive," it does "something more" by actively "encouraging residents of the forum

1 state,” touting its licenses to conduct business in most states and boasting a clinical staff that
 2 “reaches all 50 states.” (Okamoto Decl., Ex. A.) NutriThrive’s web-site also targets residents of
 3 California by featuring as the centerpiece of its home page an announcement regarding the San
 4 Diego Oley Conference. (*Id.*, Ex. B.) As noted above, BioRx’s efforts to encourage California
 5 residents have succeeded, as BioRx has customers in California.

6 For these reasons, BioRx’s purposeful directed its infringing activities to this forum.

7 **c. Nutrishare’s Claims “Arise Out Of” BioRx’s Minimum Contacts.**

8 Nutrishare’s Complaint alleges causes of action for trademark infringement and unfair
 9 competition. (*See* Complaint filed 6/4/08.) These causes of action directly “arise out of” BioRx’s
 10 contacts with the State of California, including its advertising and marketing of NutriThrive
 11 products, its maintenance of an interactive web-site for its NutriThrive products, its
 12 representations to California customers that it will provide NutriThrive products to California
 13 residents, its mailing of NutriThrive promotional materials (including a Patient Orientation
 14 packet) to California customers, and its shipment of the infringing NutriThrive products to
 15 California residents pursuant to its licenses with the California Board of Pharmacy.

16 BioRx’s argument that Nutrishare’s claims do not “arise out of” BioRx’s California
 17 contacts hinges on the misplaced notion that this Court should disregard any of BioRx’s contacts
 18 with this State related to its non-TPN products – including the fact that it has at least two
 19 customers within this State for the NutriThrive enteral nutrition products – because its California
 20 customers “utilize products that are not competitive with the TPN products offered by Plaintiff.”
 21 (Motion at 2:13-14.) This argument constitutes an attempt to mislead the Court with a red
 22 herring.

23 As an initial matter, BioRx’s argument has no factual basis. First, the overwhelming
 24 evidence showing that BioRx does in fact have customers for the NutriThrive TPN products
 25 within this State, and indeed, within this district. (Okamoto Decl., ¶ 6, Ex. D, ¶ 11, Rielly Decl.,
 26 ¶¶ 12-13.) Second, Nutrishare also provides enteral nutrition products and services to its TPN
 27 customers. (Okamoto Decl., ¶ 14.) The products and services offered by the parties are therefore
 28 competitive.

1 More importantly, BioRx’s argument has no legal basis. Under controlling law – which
 2 BioRx entirely ignores – BioRx’s sales of even completely unrelated and noncompetitive
 3 products under the “NutriThrive” name can give rise to trademark infringement and unfair
 4 competition, as long as there is a likelihood of confusion about the source, affiliation,
 5 sponsorship, or relationship of the products and services offered by the two parties.

6 Competition between the parties is but one of eight factors the Court must evaluate to
 7 determine whether the relevant consuming public is likely to be confused. *AMF Inc. v. Sleekcraft*
 8 *Boats*, 599 F.2d 341, 348 (9th Cir. 1979). In fact, the *Sleekcraft* test was developed for the very
 9 purpose of determining if there is infringement when the products “are not in direct competition”
 10 *Id.* at 348 (emphasis added). McCarthy’s treatise on trademark law also echoes the sentiment that
 11 “The vast majority of modern decisions have adopted the rule that competition is not necessary
 12 between the parties for there to be a likelihood of confusion.” 4 J. Thomas McCarthy, McCarthy
 13 on Trademarks and Unfair Competition §24:13 (3d ed. 2008). The Trademark Manual of
 14 Examining Procedure, published by the United States Patent and Trademark Office, likewise
 15 provides:

16 The goods or services do not have to be identical or even competitive in order to
 17 determine that there is a likelihood of confusion. . . . The issue is not whether the goods
 18 will be confused with each other, but rather whether the public will be confused about
 their source.

19 TMEP § 1201(a)(i).

20 Following this rationale, numerous courts of this and other circuits have held there to be
 21 infringement notwithstanding that the parties’ products and/or services were not competitive. *See*
 22 *e.g. Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1147 (9th Cir. 2002) (ENTREPRENEUR
 23 for public relations company held likely to be confused with ENTREPRENEUR for magazine);
 24 *Dreamwerks Production Group, Inc. v. SKG Studio*, 142 F.3d 1127, 1131-32 (9th Cir. 1998)
 25 (DREAMWORKS for film studio held likely to be confused with DREAMWERKS for company
 26 that promotes science fiction merchandise and organizes Star Trek conventions); *E. & J. Gallo*
 27 *Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992) (GALLO for cheese held likely
 28 to be confused with GALLO for wine and salame). *Fleischmann Distilling Corp. v. Maier*

1 *Brewing Co.*, 314 F.2d 149, 151 (9th Cir. 1963) (BLACK AND WHITE for beer held likely to be
 2 confused with BLACK AND WHITE for whisky); *On-line Careline Inc. v. America Online Inc.*,
 3 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000) (ON-LINE TODAY for Internet connection
 4 services held likely to be confused with ONLINE TODAY for Internet content); *In re Martin's*
 5 *Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984) (MARTIN'S for
 6 wheat bran and honey bread held likely to be confused with MARTIN'S for cheese); *In re*
 7 *Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM for a buffered solution
 8 equilibrated to yield predetermined dissolved gas values in a blood gas analyzer held likely to be
 9 confused with CONFIRMCELLS for diagnostic blood reagents for laboratory use); *In re Jeep*
 10 *Corp.*, 222 USPQ 333 (TTAB 1984) (LAREDO for land vehicles and structural parts therefor
 11 held likely to be confused with LAREDO for pneumatic tires). Under this law, even if
 12 NutriThrive sold no TPN products – which is not true – its activities could still constitute
 13 infringement as long as the public is likely to be confused.

14 Furthermore, even if NutriThrive sold only enteral nutrition products – which is also not
 15 true – its activities could still constitute infringement as long as the parties' products are "likely to
 16 be encountered by the same persons in situations that would create the incorrect assumption that
 17 the originate from the same source." TMEP § 1201(a)(i). *E. & J. Gallo Winery*, 967 F.2d at 1291
 18 (GALLO salame and cheese are "are sold in the same deli cases in grocery stores"); *Tillamook*
 19 *Country Smoker v. Tillamook County Creamery Ass'n*, 311 F. Supp. 2d 1023, 1042 (D. Or. 2004)
 20 (defendant's TILLAMOOK cheese and plaintiff's TILLAMOOK smoke meats "appear in the
 21 same supermarkets and thus are likely to be encountered by consumers during the same shopping
 22 trip"). BioRx cannot deny that its NutriThrive enteral products and services and Nutrishare's
 23 TPN products and services are likely to be encountered by the same consumer in the marketplace;
 24 that is, BioRx and Nutrishare would be in the same proverbial "aisle" of an on-line drug store.

25 For the foregoing reasons, this Court has specific jurisdiction over BioRx because
 26 Nutrishare's claims "arise out of" all of BioRx's contacts with this state related to any and all
 27 products and services sold under the "NutriThrive" name – TPN, enteral, or otherwise.
 28

1 **3. Exercise of Jurisdiction in this Forum Is Reasonable.**

2 Because Nutrishare has proffered sufficient evidence to establish a *prima facie* case of
 3 both general and specific jurisdiction, personal jurisdiction is presumptively reasonable, and
 4 BioRx bears the burden of “present[ing] a compelling case” that the exercise of jurisdiction
 5 would be so unreasonable as to violate due process. *Burger King Corp.*, 471 U.S. at 477; *Sher v.*
 6 *Johnson*, 911 F.2d 1357, 1364 (9th Cir. Cal. 1990). In determining the reasonableness of
 7 jurisdiction, this Circuit has identified the following factors to consider: the extent of the
 8 defendant’s purposeful interjection into the forum state; the burden on the defendant of defending
 9 in the forum state; the extent of conflict with the sovereignty of the defendant’s state; the forum
 10 state’s interest in adjudicating the dispute; the most efficient forum for judicial resolution of the
 11 dispute; the importance of the chosen forum to the plaintiff’s interest in convenient and effective
 12 relief; and the existence of an alternative forum. *Sher*, 911 F.2d at 1364; *Sinatra v. National*
 13 *Enquirer, Inc.*, 854 F.2d 1191, 1198-99 (9th Cir. 1988).

14 BioRx has not examined any of these factors in its moving brief. Therefore, it has failed
 15 to meet its burden of “presenting a compelling case” of unreasonableness, and the Court should
 16 presume that jurisdiction is reasonable. Even if the Court were to examine the above factors, it is
 17 clear that the exercise of personal jurisdiction is reasonable.

18 The first factor, “purposeful interjection, is analogous to the purposeful avilment factor
 19 discussed above. *Sinatra*, 854 F.2d at 1199; *see Corporate Investment Business Brokers v.*
 20 *Melcher*, 824 F.2d 786, 790 (9th Cir. 1987) (“Ninth Circuit cases give the ‘purposeful
 21 interjectment’ factor no weight once it is shown that the defendant purposefully directed its
 22 activities to the forum state. . .”). Thus, for the reasons detailed above, it does not weigh against
 23 jurisdiction.

24 Regarding the second factor, BioRx makes no argument as to why the exercise of
 25 jurisdiction would be burdensome, and in fact, concedes that it would be willing to litigate this
 26 matter in the U.S. District Court for the Southern District of California, (motion at 5:24-27),
 27 which is just as distant from BioRx’s headquarters as is this Court. Furthermore, given that
 28 BioRx has already consented to the jurisdiction of the California Board of Pharmacy and

1 California courts with respect to issues arising from its pharmacy licenses and designated an
2 agent for service of process in Sacramento, it would not be unreasonably more burdensome for
3 BioRx to also be subject to jurisdiction of the courts of this State with respect to issues arising
4 from its infringing pharmacy operation. Moreover, BioRx touts being a “national” home infusion
5 pharmacy with licenses in “most states” and a staff that “reaches all 50 states.” (Okamoto Decl.,
6 Ex. A.) Thus, BioRx cannot now claim that it would suffer a great burden having to litigate in
7 any one of these 50 states. Finally, although it may at one time have been more burdensome for
8 BioRx to litigate in California than in Ohio, where it has its principal place of business, “with the
9 advances in transportation and telecommunications and the increasing interstate practice of law,
10 any burden is substantially less than in days past.” *Menken v. Emm*, 503 F.3d 1050, 1060 (9th
11 Cir. Ariz. 2007). Thus, the second factor does not weigh in BioRx’s favor.

12 The third factor, conflict with sovereignty of defendant’s state, is inapplicable in this
13 instance because there is no conflict between the sovereignty of Ohio and California.

14 The fourth factor, the forum state’s interest in adjudicating this dispute, weighs in favor of
15 Nutrishare. This Circuit previously has ruled that “California maintains a strong interest in
16 providing an effective means of redress for its residents tortiously injured by commercial
17 misappropriation.” *Sinatra*, 854 F.2d at 1200. As Nutrishare is a California corporation with its
18 principle place of business in California and is alleging that it has been tortiously injured by
19 BioRx’s trademark infringement, California’s interest weights in favor of jurisdiction.

20 The fifth factor, efficiency of adjudication within this forum, focuses on “where the
21 witnesses and the evidence are likely to be located.” *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d
22 1482, 1489 (9th Cir. 1993). Nutrishare is based in California and nearly all of Nutrishare’s
23 witnesses reside in California. Evidence related to Nutrishare’s state law claims is also primarily
24 located in California. Thus, this factor favors Nutrishare.

25 The convenience and effectiveness of relief for the plaintiff comprise the sixth factor.
26 This forum is the only forum in which Nutrishare will be able to effectively litigate its state law
27 unfair competition claims. Thus, this factor favors Nutrishare.

28 The final factor, the availability of an alternate forum, likewise weighs in Nutrishare’s

1 favor. Although BioRx presumably believes that this lawsuit should have been filed in federal
 2 court in Ohio, “whether another reasonable forum exists becomes an issue only when the forum
 3 state is shown to be unreasonable.” *Sinatra*, 854 F.2d at 1201 (citation omitted). In this case,
 4 BioRx cannot show that exercise of jurisdiction in this forum would be unreasonable.

5 Taking all of the factors as a whole, BioRx has failed to make any case, let alone “a
 6 compelling case,” that the exercise of specific jurisdiction is so unreasonable as to violate due
 7 process.

8 **B. Venue is Proper in the Eastern District.**

9 Venue is proper in the Eastern District under 28 U.S.C. § 1391(b)(1) and (2), which
 10 provide that, in a federal question case, venue is proper either where: (1) BioRx “resides”; or (2)
 11 “a substantial part of the events or omissions” on which Nutrishare’s claims are based occurred.

12 **1. Venue is Proper under 28 U.S.C. § 1391(b)(1).**

13 With respect to the residence-based venue provision, BioRx argues that it “does not reside
 14 in California, but rather in Ohio.” (Motion at 5:12.) In making this argument, BioRx fails to
 15 acknowledge that the key venue provision in the U.S. Code provides that, “a defendant that is a
 16 corporation shall be deemed to reside in any judicial district in which it is subject to personal
 17 jurisdiction at the time the action is commenced.” 28 U.S.C. § 1391(c) (emphasis added). Courts
 18 have extended this venue provision to apply to entities other than corporations, including limited
 19 liability companies such as BioRx. *Denver & Rio Grande Western R.R. Co. v. Brotherhood of*
 20 *Railroad Trainmen*, 387 U.S. 556, 559–560 (1967); *Wells v. Cingular Wireless LLC*, 2006 U.S.
 21 Dist. LEXIS 73664, *4 (N.D. Cal. 2006). Thus, in the case of an entity defendant such as BioRx,
 22 the federal venue statute has conflated the jurisdiction and venue inquiry into essentially the same
 23 inquiry: venue is proper in the Eastern District of California if there is jurisdiction over BioRx in
 24 this district. 28 U.S.C. § 1391(c).

25 Nutrishare has already elaborated in great detail why BioRx is subject to specific
 26 jurisdiction within this district. Specifically, as already explained, BioRx is subject to general
 27 jurisdiction in this district because: BioRx has already consented to the jurisdiction of the
 28 California Board of Pharmacy, located in this district, as well as the courts within the Eastern

District of California; BioRx appointed an agent for service of process in Sacramento, California, as a prerequisite to obtaining its two licenses to conduct business in this State; and discovery likely will show that BioRx also has contacts with the Eastern District with respect to its non-TPN product lines. *See supra* at III(A)(1). With respect to specific jurisdiction, BioRx has purposefully availed itself of the privileges of conducting business within this district by not only obtaining a license in this district to conduct its NutriThrive business within this district, but by appointing an agent for service of process in this district and actually serving customers within this district. *See supra* at III(A)(2)(a). BioRx has also purposefully directed its activities to this district by intentionally infringing Nutrishare's mark with knowledge of Nutrishare's location, agreeing to ship NutriThrive products and brochures to customers within this district, actually shipping NutriThrive products to this district, and operating an interactive web-site that "reaches" this and every other district within California. *See supra* at III(A)(2)(b). Therefore, venue is proper in this Court.

2. Venue is Proper under 28 U.S.C. § 1391(b)(2).

Venue is also proper under the venue provision that is based on where "a substantial part of the events or omissions" giving rise to Nutrishare's claims occurred. Courts of this Circuit have held that in a trademark infringement case, a "substantial part" of the events triggering infringement occurs either where the plaintiff trademark owner is located or where the infringement, *i.e.*, the likelihood of confusion, occurs. *Sidco Indus., Inc. v. Wimar Tahoe Corp.*, 768 F. Supp. 1343, 1346-47 (D. Or.1991) (holding venue proper in Nevada where infringer was located or in Oregon where confusion was likely to occur); *United States Aluminum Corp. v. Kawneer Co.*, 694 F. 2d 193, 195 (9th Cir. 1982) (holding venue proper where alleged patent infringement occurred); *Flotsam of Cal., Inc. v. Huntington Beach Conf. & Visitors Bureau*, 2007 U.S. Dist. LEXIS 9472, *3 (N.D. Cal. 2007) (holding venue proper in Northern District of California when defendant, based in Southern California, sold infringing t-shirts in the Northern District); *Radical Prods., Inc. v. Sundays Distrib.*, 821 F. Supp. 648, 649-50 (W.D. Wash. 1992) (holding venue proper when defendant mailed brochures for infringing products to district in which action was filed); *Sykes Lab., Inc. v. Kalvin*, 610 F. Supp. 849, 860 n.8 (C.D. Cal. 1985)

(holding venue proper where the “passing off” or likelihood of confusion occurred).

In this case, Nutrishare is located within the Eastern District and BioRx’s infringing activities – including the mailing of brochures for its infringing products and the mailing of the infringing products – occurred within the Eastern District. Therefore, venue is proper in this district under 28 U.S.C. § 1391(b)(2).

C. BioRx has Failed to Demonstrate Why this Matter Should Be Transferred to San Diego.

Only two short sentences are devoted to BioRx’s motion to transfer venue. (Motion at 5:24-27.) In these sentences, BioRx argues that this action should be transferred to the U.S. District Court for the Southern District of California because that is where it has “limited contacts.” (*Id.*) This argument falls woefully short of the requirements of the venue transfer statute, 28 U.S.C. § 1404. In fact, BioRx does not even cite this statute, let alone explain why this action should be transferred to federal court in San Diego.

A district court has discretion to adjudicate motions for transfer according to an “individualized, case-by-case consideration of convenience and fairness.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). In order for a district court to transfer an action under 28 U.S.C. § 1404, the Court must find that: (1) the transferee court is one where the action “might have been brought,” and (2) that the convenience of the parties and witnesses and the interest of justice favor transfer. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). The second part of this test involves an analysis of the following factors: (a) plaintiff’s choice of forum; (b) convenience of the parties and witnesses; (c) ease of access to sources of proof; (d) local interest in the controversy; (e) familiarity of each forum with applicable law; and (f) relative congestion in each forum. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-509 (1947)).

Typically, a court should give the plaintiff’s choice of forum “great deference” unless the defendant can show that other factors of convenience clearly outweigh the plaintiff’s choice of forum. *Ellis v. Costco Wholesale Corp.*, 372 F. Supp. 2d 530, 537 (N.D. Cal. 2005) (“Where

venue is governed by a more permissive standard, a plaintiff's choice is entitled to greater deference as a matter of law.") BioRx "must make a strong showing of inconvenience to warrant upsetting plaintiff's choice of forum." *Hope v. Otis Elevator Co.*, 389 F. Supp. 2d 1235, 1243 (E.D. Cal. 2005) (quoting *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986)).

Because BioRx has not discussed any of the factors above, it has failed to meet its burden and Nutrishare's choice of forum should prevail.

D. If The Court Does Not Deem There to Be Sufficient Jurisdictional Evidence, It Should Permit Limited Jurisdictional Discovery.

Finally, if the Court believes there to be inadequate evidence regarding BioRx's contacts with this State and/or district, it should permit Nutrishare to conduct limited jurisdictional discovery to aid it in determining whether personal jurisdiction exists. *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977). In this discovery, Nutrishare would seek, *inter alia*, (a) identification of and possible depositions of BioRx's and NutriThrive's customers, partners, and suppliers within California and this district (and specifically, the family in Redding); (b) identification of and possible depositions of medical professionals, including healthcare facilities, physicians, nurses, pharmacists, and nursing agencies in California with whom BioRx and NutriThrive have had a business relationship; (c) financial data related to BioRx's and NutriThrive's sales of products and services within California and this district; (d) historical data on BioRx's and NutriThrive's activities within California and this district (including conference and meeting attendance); (e) documents related to BioRx's and NutriThrive's marketing within California, including in publications circulated in California and/or published in California; (f) documents related to BioRx's and NutriThrive's application for pharmacy licenses, accreditations, permits, certifications, or other business-related authorizations within California and this district, including before the Board of Pharmacy located at 1625 N Market Blvd, N219, Sacramento, California, 95834.

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1 **IV. CONCLUSION**

2 In light of the above, BioRx – a national company with California business licenses –
3 cannot in good faith maintain that it has “no contacts with California” or this District. BioRx’s
4 numerous contacts with California establish that it has such significant, continuous, and sustained
5 connections with this state to warrant even the exercise of general jurisdiction. Even BioRx’s
6 “minimum” contacts demonstrate that it should at least be subject to the specific jurisdiction of
7 this State. Finally, not only is venue proper in this district due to BioRx’s contacts with this
8 district, but BioRx has failed to meet its burden of both proving that venue is improper here or
9 that the case should be transferred elsewhere. For the foregoing reasons, Nutrishare respectfully
10 requests that the Court deny BioRx’s Motion to Dismiss or Transfer this action.

11 Dated: July 28, 2008

DOWNEY BRAND LLP

12
13
14 By: /s/ Michael J. Thomas
15 MICHAEL J. THOMAS
16 Attorney for Plaintiff
17 Nutrishare, Inc
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